BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 130 F. 2d 350 (Adv. Sh.) and at page 349 of the record. The opinion of the District Court on demurrer is reported in 28 F. Supp. 334. It was reaffirmed on final hearing (R. 300).

Jurisdiction.

The basis upon which it is contended this court has jurisdiction to review is stated in the petition (*ante*, p. 5).

Statement.

A statement of everything material to a consideration of the questions presented is in the petition (*ante*, pp. 2-4).

Questions Presented.

The questions presented are stated in the petition (*ante*, p. 5).

Reasons for Allowance of Writ.

The reasons for allowing the writ are stated in the petition (*ante*, pp. 6-13).

Statutes Involved.

Sections 401 and 402 (a) and (b) of the federal Revenue Act of 1921 are referred to and quoted in the petition (*ante*, pp. 5, 6).

Section 10, Chapter 41 of the Illinois Revised Statutes (Cahill, 1921) is referred to and quoted in the petition (*ante*, p. 6).

SUMMARY OF ARGUMENT.

I.

Point I of the Argument distinguishes the cases cited by the Circuit Court of Appeals to sustain its decision that the statutory one-third interest of the widow in the personal property of decedent, should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921, and cites additional cases in support of the Petition.

II.

Point II of the Argument distinguishes the cases cited by the Circuit Court of Appeals to sustain its decision that the statutory life interest of the widow in one-third of decedent's lands in Illinois, should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921, and cites additional cases in support of the Petition.

ARGUMENT.

Petitioners respectfully submit that the cases cited and relied on by the Circuit Court of Appeals for the Seventh Circuit do not sustain its opinion, or decision.

Point I.

The cases cited by the Circuit Court of Appeals do not sustain its decision that the word, "debts", includes "expenses of administration" and that therefore the statutory one-third interest of the widow in decedent's personal property should be included in determining the gross value of decedent's taxable estate under the provisions of the federal Revenue Act of 1921 which expressly require the includable property to be subject to the payment of both debts and administration expenses.

The Circuit Court of Appeals states (130 F. 2d at p. 354, R. 354) that its decision is based solely upon "dicta and tacit holdings" of Illinois courts, and uses as its principal example the case of *Laurence* v. *Balch*, 195 Ill. 626. In that case a surviving husband, claiming under a statute not here involved, filed a petition in the Probate Court of Cook County, Illinois, which was administering his deceased wife's estate, claiming the entire personal estate left by her and contending "and asking that he be permitted to pay all claims *and costs* lawfully chargeable against said estate".

The question involved in the case at bar was not involved, raised, or considered by the court in *Laurence* v. *Balch*. As the Supreme Court said in that case (p. 630):

> "* * * it is conceded by both parties that the only question presented for decision here is whether the appellant is entitled to the whole or only to one-third of his deceased wife's estate remaining after the payment of debts and costs."

Apparently the Court of Appeals, though citing and relying on *Zakroczymski* v. *Zakroczymski,* 303 Ill. 264, 269, overlooked the statement in the dissenting opinion in that case that in the case of *Laurence* v. *Balch* "the only question argued and presented to the court for decision by the briefs of counsel was whether he [the surviving husband] was entitled to one-third of the personal property or to all of it."

In the footnote to its opinion (R. 354) the Circuit Court of Appeals refers to three other cases "For further instances of the use of the word 'debts' so as to include more than the obligations of the decedent". We submit that the Circuit Court of Appeals has also misapprehended and misapplied the decisions in those cases.

In *In re Taylor's Will,* 55 Ill. 252 (the first case cited in said footnote) the Illinois Supreme Court says (p. 260):

> "We therefore hold • • • that under our law it is not in the power of the husband so to dispose of his estate as to deprive his widow of the third of the personal property remaining after the payment of *his* debts, • • •."

That case clearly limits the obligations to which the widow's one-third of the personal property is subject, not only to "debts," but also to "his" debts, that is, to the debts of the decedent, himself. That decision, instead of supporting the opinion of the Court of Appeals, supports petitioners' contention.

Again, in *Cribben* v. *Cribben,* 136 Ill. 609, while speaking of the rights of husband and wife, each of whom is entitled to dower in Illinois, the Court said (p. 613):

> "He could only defeat her will by successfully contesting it, or by renouncing its provisions in his favor, and thereby preserve his right to dower in her real estate, and to one-third of her personal estate after the payment of *her* debts."

In *Zakroczymski* v. *Zakroczymski,* 303 Ill. 264 (1922), *supra* (the second case cited by the Court of Appeals in its footnote), the Court quotes and approves the above rule laid down in *In re Taylor's Will* and again limits the "debts" to those of the decedent, and adds (p. 266):

> "This construction of the statute has been followed by the courts in later decisions and has been universally regarded as the settled law of this State."

The sole question involved in the case of *Saunders* v. *Saunders,* 310 Ill. 371 (the third and last case cited by the Circuit Court of Appeals in its footnote) was whether the widow, for whom no provision had been made in the will, had such an interest as entitled her under the Illinois statute to contest the will. The court held that she had no such interest. That question arose upon demurrer and no question was involved, raised, or discussed as to whether or not the interest of the widow was subject to expenses of administration.

The case of *Waddill* v. *Waddill,* 296 Ill. 204, also relied on by the Circuit Court of Appeals, neither involved nor considered the question now under discussion, but involved solely the question whether, under the form of renunciation there filed by the widow, she was entitled to both dower (which is not subject to debts in Illinois) and also to her share in the personal estate under a section of the Illinois Dower Act which is not involved in the instant case but which applied only to cases where, unlike here, the deceased left no child, or descendant. In using the words "debts and claims against the estate", the court in the *Waddill* case was quoting from Section *12* and not from Section 10 which is the one here involved and which omits the words, "and claims against the estate".

Moreover, the Court of Appeals overlooked the fact that expenses of administration are not claims against an estate. (See cases *ante,* pp. 7-9.)

The "dicta and tacit holdings" on which alone the Court of Appeals grounded its conclusion that the widow's statutory interest in decedent's personalty "is subject to all debts of the estate, those of administration as well as those incurred by the decedent", are mere loose expressions which do not even constitute a "precedent". *The Edward,* 1 Wheat. 261, 276.

In *Webster* v. *Fall,* 266 U. S. 507, the question involved was whether the Secretary of the Interior was a necessary party to a suit instituted by a member of the Osage Tribe of Indians seeking a mandatory injunction commanding the Secretary to make certain payments to plaintiff under an act of Congress. Counsel for plaintiff directed this Court's attention to cases where it had proceeded to determine the merits although the suits were brought against subordinate officials without joining the Secretary. In referring to those cases this court said:

> (511) "We do not stop to inquire whether all or any of them can be differentiated from the case now under consideration, since in none of them was the point here at issue suggested or decided. The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

The same rule obtains in Illinois:

> "Isolated expressions are not to be employed to expand the opinion into holding more than its plain import, or as deciding questions not essential to a determination of the issues before the court." *People* v. *Kennedy,* 367 Ill. 236, 241.

The Court of Appeals not only misapprehended the decisions on which it based its opinion and gave undue weight to "dicta and tacit holdings", but it also ignored the numerous decisions of the Supreme Court of Illinois (*ante,* pp. 8, 9) uniformly holding that an expense of administration arises wholly out of the action of the representa-

tive of the deceased, is a claim against him personally, and is not a claim against the estate and cannot be treated, or filed as such.

We also call the Court's attention to the fact that in the District Court counsel for the respondent unqualifiedly admitted that debts and expenses of administration are entirely separate items (R. 21, 22):

> "Mr. Mayer: * * * In that case (*Crooks* v. *Harrelson*), the court had to distinguish between debts and expenses of administration. * * *
>
> "Mr. Gibbs: I will admit they are separate. I admit that they are not the same."

Such an unqualified admission should, we submit, have precluded respondent from thereafter repudiating it and complaining because the District Court ruled accordingly.

The Court of Appeals also ignored the decision of this Court in *Crooks* v. *Harrelson*, 282 U. S. 55 (*ante*, p. 7) that claims against the estate and debts, or charges against the estate, "plainly * * * are different and distinct things." We respectfully submit that the construction by this Court of a federal tax statute as to what property such statute includes within its terms as taxable thereunder, is controlling. This Court, having decided what Congress meant in respect of the very statute here under consideration, it will not do to say that debts include expenses of administration. Even were the question open to doubt, which it is not,—this being a taxing act—the doubt would have to be resolved in favor of the taxpayer (*Crooks* v. *Harrelson*, 282 U. S. 55, 61).

It cannot be claimed that the widow's statutory interest in the personalty falls under Section 402(b) of said Revenue Act because dower in Illinois land never included any interest in personal property (*Clark* v. *Hanson*, 320 Ill. 480, 484, 487), and the widow takes personalty in lieu of the testamentary provisions and not "in lieu of dower". (*Canavan* v. *McNulty*, 328 Ill. 388.)

Indeed, during the argument on the demurrer counsel for respondent, themselves, insisted that Section 402(a) alone governs this case with respect to the personalty (R. 19, 23, 24).

Point II.

In including the widow's statutory life interest in one-third of decedent's Illinois lands while determining the gross value of decedent's taxable estate, the Circuit Court of Appeals misapprehended the nature of this interest.

In *Sisk* v. *Smith,* 6 Ill. 503, 506, 508 the Supreme Court of Illinois, after an exhaustive review of the history of dower, held that the husband's death "casts upon her no new estate or interest, but simply consummates a pre-existing imperfect one", which is "contingent upon * * * her husband's death", and that "the contract of marriage is as operative to confer upon the wife a separate life estate in the lands of her husband, as would be a contract whereby the husband himself had conveyed to any third person, a life estate, in express terms in the same lands, and as the tenant for life in such case would hold such estate as an incumbrance upon the fee simple estate of the grantor, beyond his reach or control, so does the wife hold her freehold estate beyond the reach or control of her husband, * * * because her title being consummated by his death, has relation to the time of the marriage, and to the seizin which her husband then had".

To the same effect: *Schoellkopf* v. *DeVry,* 366 Ill. 39, 44-5, 49, where the court said:

> "The wife's life estate, denominated dower, arose solely by operation of law. * * * The wife's right to dower accrues solely because of the marriage relation * * *."

The widow's statutory interest in decedent's land was her separate, independent property wholly free from any control over or interest therein on the part of decedent, and the provisions in his will for her benefit constituted an "offer on his part to purchase her statutory interest in his estate for the benefit of the estate." (*McGee* v. *Vandeventer,* 326 Ill. 425, 432.) Where the widow takes under the will it is a "matter of contract or convention between them," and she takes the property "not as a beneficiary under the will, but as a purchaser." (*Carper* v. *Crowl,* 149 Ill. 465, 479.) Counsel for respondent themselves admitted this to be the law in Illinois (R. 23).

Emmert v. *Hill,* 226 Ill. App. 1 shows that where, as here, the widow takes under the will she takes as a *purchaser,* and that the purchase price is her statutory interest in her husband's estate and that the interest which she relinquishes (which includes her dower) is her own separate property, and that the husband's death does not result in any transfer from decedent of any of his property.

These Illinois cases are controlling and they conclusively and uniformly show that in Illinois the widow's dower, whether inchoate, or consummate, is her independent, exclusive property and is in no manner subject to the husband's disposition, or control, and cannot be affected in any way without her consent.

The Circuit Court of Appeals cites in support of its opinion on this point, *Allen* v. *Henggeler,* 8 Cir. 32 F. 2d 69, a case on which respondent's counsel placed their principal reliance. In that case the dower involved was in Nebraska land and its characteristics were wholly unlike those of Illinois dower. The court there held that dower in land in Nebraska "is subject to the payment of debts of the deceased", and "is for his enjoyment, and not hers", and that the husband "could entirely wipe out the

wife's interest", and that "he has every right of ownership, save that he cannot will it without her consent", and that his rights "are among the most valuable incidents of ownership".

The Circuit Court of Appeals in the case at bar construed the decisions of this Court in *Y. M. C. A.* v. *Davis,* 264 U. S. 47 and *Edwards* v. *Slocum,* 264 U. S. 61, as holding that the federal estate tax is measured by the interest of the decedent which ceased at his death, *even though nothing was transferred from the decedent.* We respectfully submit that said decisions do not so hold, and that if they are in point at all, they hold to the contrary.

The question involved in the case of *Y. M. C. A.* v. *Davis,* 264 U. S. 47, was whether the federal estate tax was deductible from an exempt residuary bequest to charities. The charities contended that inasmuch as, in determining the net estate subject to tax, the amount of the residuary charitable bequest was deducted from the gross estate, it was improper to pay the federal estate tax out of such residuary bequest.

When this court, in overruling that contention, said at p. 50 that "what this law taxes * * * the interest which ceased by reason of the death", it obviously referred to an interest which belonged to the deceased and which was transmitted from him by his death. This clearly appears from what this court said in the same connection, and while defining the estate tax, viz. (p. 50):

> "What was being imposed here was an excise upon the *transfer* of an estate upon the death of the *owner.* It was not a tax upon succession and receipt of benefits under the law or the will." (Italics are ours.)

That decision of this Court decides only that the federal estate tax is an excise tax levied upon the net estate left by the decedent and not upon the amounts received by the legatees or devisees under the will. No such question

as was involved in that case is involved in the case at bar.

If the *Y. M. C. A.* case is in point at all in the case here under consideration, it sustains petitioners' contention, inasmuch as in the instant case *the widow did not receive her dower by succession from or gift by the decedent.*

The construction placed by the Circuit Court of Appeals upon that decision of this Court would mean that if a decedent had a life estate terminating on decedent's death, the value of such life estate would be included as taxable in decedent's estate. We submit that the opinion of this Court should not be so construed.

The case of *Edwards* v. *Slocum,* 264 U. S. 61, relied on by the Court of Appeals, holds only that the Government could not add the amount of the federal estate tax to the taxable estate in determining the net estate on which the federal estate tax is computed. The question in that case was entirely different from the question here under consideration. However, if that decision is in point at all, it is authority for petitioners' contention that there must be a *transfer* from *the decedent* and *not a* mere *ceasing of interest* of a decedent. As this Court there says (p. 62), "this is not a tax upon a residue, it is a *tax upon a transfer of* HIS *net estate by a decedent*".

Section 401 of the Revenue Act of 1921 in unmistakable language imposes the tax, not upon a transfer, alone, but "upon the transfer of the net estate *of* every decedent", *i. e.,* the property to be included in the gross estate must belong to decedent.

Section 402(b) does not enlarge the property described in Section 401 of the Revenue Act. By Section 401 the tax is, in unmistakable language, "imposed upon the transfer of the net estate of every decedent", and upon nothing else.

The wife's statutory dower in Illinois lands is a right to one-third of the real estate (owned by the husband at any

time during the marriage) for that portion of her life beginning with her husband's death and ending with her death. She acquires such right upon her marriage, (or the subsequent purchase of the real estate after her marriage), solely by virtue of the statute and not by transfer from her husband. The death of the husband "casts upon her (the widow) no new estate or interest, but simply consummates a pre-existing imperfect one". (*Sisk* v. *Smith,* 6 Ill. 503, 507.) In Illinois the title of the doweress is precisely the same as though the original owner had executed two deeds, the first one giving the wife a life estate in the land contingent only on her surviving her husband, and the second deed conveying title to the husband subject to the wife's life estate. The death of the husband is merely the happening of the event which fixes the date of the commencement of the widow's life estate. The situation is the same as if the widow's right to her life estate would have come into being upon the death of a third person instead of upon the death of her husband. The death of decedent was not the generating source of the wife's interest. Nothing was transmitted or moved from him upon his death. (*Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 348; *Coolidge* v. *Long,* 282 U. S. 582, 597.)

In *Coolidge* v. *Long,* 282 U. S. 582, a trust was created by Mr. and Mrs. Collidge under which the income was to be paid to the settlors and their survivor for life, and after the death of the survivor to their children. In holding a Massachusetts succession tax statute to be unconstitutional, this court said:

> (597-8) "Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. *Knowlton* v. *Moore,* 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termina-

> tion of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

To same effect: *Industrial Trust Co.* v. *U. S.*, 296 U. S. 220.

The case at bar must not be confused with cases where the deceased had some interest in, or control over the property held to be includable in his estate, such as those involving a joint tenancy, or a tenancy by the entirety.

We also draw attention to *Randolph* v. *Craig*, 267 Fed. 993, in which the opinion was rendered by Judge Sanford, later a distinguished member of this court. Respondent's counsel, while referring to that case in a brief filed below, correctly said (R. 39) that the court there held:

> "If the widow receives her dower not in succession to her deceased husband or by transfer from him, but takes under statutory provisions whereby it vests in her independently of her husband and adversely to his estate, the property assigned to her as dower has been held to be not a part of the husband's gross estate upon which the tax is imposed by the federal estate tax law."

Inasmuch as petitioner, Rachel Mayer, did not and could not acquire her dower by transfer from the decedent, nor through succession from him, as it was never under his control and was never any part of his property, or "of his estate", the *Edwards* case, if in point at all, is, to repeat, authority for the proposition that the value of the widow's dower here should not be included in determining the value of the net estate passing under the will of decedent.

The Circuit Court of Appeals also relied on *Billings* v. *The People*, 189 Ill. 472. That case involved the construction of an inheritance, or succession tax, and not an excise, or estate tax. But "a tax on the privilege of transmission", which is the federal tax, is entirely different from "a tax on the privilege of succession", which is the

State tax. *Stebbins* v. *Riley,* 268 U. S. 137, 144-5; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270-1. Besides, as was said in *Allen* v. *Henggeler,* 8 Cir. 32 F. 2d 69, 71, one of the cases relied on by the Circuit Court of Appeals in this case, "Decisions under state laws taxing the right of succession or taxing property which passes by will or inheritance are * * * not in point".

In the *Billings* case the Supreme Court of Illinois held that the State tax was levied upon the widow's right to enter into the enjoyment of her estate of dower, although admitting that *she did not receive her dower right by transfer from her husband upon his death.* The court merely held that the State of Illinois, which gave the right of dower to the widow, had the power to modify it, or take it away entirely before it vested. No such power exists in Congress. The decision, in effect, confirms petitioners' contention that the husband never had any interest in or control over the widow's dower and that she acquired her dower rights as her separate, exclusive property through her marriage and not through, but in spite of her husband.

We submit that the following three Illinois cases relied on by the Circuit Court of Appeals (R. 352) and not cited by either party, are readily distinguishable on their facts from the case under consideration.

There is nothing in any of those cases which in any way questions the rule in Illinois that the widow's dower, whether inchoate or consummate, is her separate, exclusive property and that the husband never has any interest therein.

Virgin v. *Virgin,* 189 Ill. 144, involved a sale of certain parcels of real estate to pay debts of a decedent. Certain mortgages had been placed on the property either before the marriage, or the wife had waived her dower by joining in the mortgage. The court therefore held that the widow was entitled to dower only in any surplus in the proceeds

of the sale of the mortgaged premises after the payment of the mortgage indebtedness and the cost and charges of the sale.

Bigoness v. *Hibbard,* 267 Ill. 301, involved only the question of a widow's right to redeem from a foreclosure suit to which she was not made a party.

Bennett v. *Bennett,* 318 Ill. 193, held that the dower interest of a wife is not a freehold estate and that, therefore, the Supreme Court of Illinois was without jurisdiction of the appeal. But see *Firebaugh* v. *Wittenberg,* 309 Ill. 536, 544, wherein the court held that "whether an inchoate right of dower is in legal contemplation a vested right or estate in lands or not, it has always been recognized as a valuable right * * *."

In *McCord* v. *Massey,* 155 Ill. 123, 125, the court said:

> "A right of dower is an incumbrance, * * * and it is immaterial whether that right of dower is inchoate or consummate." (Citing authorities.)

We believe that we have clearly shown that the Circuit Court of Appeals misapplied and failed to follow the principles of prior decisions of this Court and also of the Supreme Court of Illinois, and likewise has failed to give effect to the intent of Congress.

Petitioners respectfully submit and pray that the writ of certiorari should issue.

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